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9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA

11 SAN JOSE DIVISION

12
13 UNITED STATES OF AMERICA,) Case No. CR20-0372-LHK
14 Plaintiff,)
15 v.)
16 NICHOLAS MENDOZA HIMAN,)
17 Defendant.)

18
19 In the days before his arrest on June 5, 2020, Defendant Nicholas Himan asked an associate
20 where he could get an untraceable gun to kill a drug supplier he believed had cheated him. When
21 Himan's associate did not respond quickly enough, Himan texted him that he had traveled almost 150
22 miles roundtrip to obtain the gun. Himan's text messages are corroborated by statements he made to
23 others. Before texting his associate, Himan asked another drug supplier where he could get a gun.
24 Himan also told his then roommate (his former jailmate) that he had a gun, and showed his roommate
25 the holster he purchased for the gun. Himan's roommate was disturbed to learn that Himan had a gun
26 because of what the roommate described as Himan's pattern of unpredictable behavior.

27 The FBI recovered the ankle holster Himan showed his roommate during a search of Himan's
28 room on the day Himan was arrested. The gun, however, remains missing. Three other guns are
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1 registered to the defendant. The status of those guns is unclear. As the pretrial services report indicates,
 2 Himan's family is unwilling to assist him with bail. Indeed, Himan's mother, with whom he has lived
 3 for most of his adult life, has a restraining order prohibiting Himan from contacting her.

4 In light of Himan's criminal record including multiple bench warrants for failure to appear and
 5 his alarming text messages about obtaining a gun to kill a drug supplier (which led the FBI to accelerate
 6 his arrest), Himan cannot overcome the statutory presumption in favor of detention in this case. The
 7 Court should order him detained.

8 I. FACTS

9 A. Defendant's History and Characteristics

10 1. Access to Large Amounts of Cash

11 Nicholas Himan is a long-time drug dealer who has demonstrated access to large amounts of
 12 cash. Quite unusually, he gambled almost \$346,000 at slot machines at a Northern California casino in
 13 2017, and almost \$225,000 at slot machines at the same casino in 2018. In 2019, even while spending a
 14 significant amount of time in jail, Himan gambled more than \$42,000 in slot machines at the same
 15 casino. "Gambled" is a generous term. It is widely-known that slot machines are the worst possible bet
 16 at a casino. Yet, Mr. Himan lost only 3.5% in 2019, 7.6% in 2018, 4.4% in 2017.

17 The evidence suggests that Himan's casino activity was actually a crude money-laundering
 18 scheme. Casino records show that on September 2, 2017, Himan inserted \$7,363 in U.S. currency into
 19 various slot machines and withdrew the same amount without playing a single game. On September 5,
 20 2017, Himan inserted \$13,377 in U.S. currency into various slot machines. The same day, he withdrew
 21 that money from the slot machines without playing a single game. The next day, September 6, Himan
 22 inserted \$5,770 into slot machines and then withdrew it, again without playing. Himan also regularly
 23 uses cryptocurrency, presumably for its anonymous features. Prior to Himan's first drug sale to the
 24 undercover agent in this case, he visited a Bitcoin money launderer and told the undercover that he used
 25 Bitcoin because of its anonymous features.

26 B. Himan's Erratic Pattern of Behavior

27 In January 2019, Himan was arrested for possession of drugs, paraphernalia, and driving under
 28 the influence. In November 2019, based on the January arrest, he sustained convictions for DUI, driving
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1 with a suspended license, and driving recklessly. In the interim, in June 2019, he was arrested for
2 possessing drug paraphernalia and giving false identification to a peace officer. In August 2019, he was
3 arrested for possessing a stolen vehicle, DUI, possessing personal identification with the intent to
4 defraud, and embezzling a rented vehicle. He was convicted of one count of possessing identification
5 with the intent to defraud.

6 On September 4, 2019, Himan was arrested for impersonating his brother, receiving stolen
7 property, and hit-and-run with property damage, after an associate and Himan drove an Audi into the
8 front door of a Western Dental office. Himan fled the scene and attempted to conceal the evidence of the
9 incident by parking the stolen Audi in the driveway of a random citizen.

10 On September 24, 2019 (20 days later), Himan was cited by the Oakland Police Department for
11 possession of drug paraphernalia.

12 On or about October 15, 2019, European authorities intercepted a parcel addressed to Himan at
13 his mother's address in Hayward. The parcel contained five kilograms of MDMA.

14 On October 31, 2019 (two weeks later), Himan was found in San Francisco in yet another stolen
15 car. The car was parked on the median of Park Presidio Boulevard and police found 500 Xanax pills
16 packaged for sale.

17 On November 8, 2019, a week later, the defendant was arrested again for DUI and possession of
18 unlawful paraphernalia. Another week later, on November 12, 2019, Mr. Himan was arrested again for
19 possessing drugs, paraphernalia, DUI, and driving on a suspended license. In January 2020, Himan was
20 convicted of vehicle theft. In his interactions with the undercover officer in this case, Himan bragged
21 that he "boosted cars," and suggested that if he were ever caught with drugs, he would simply tell the
22 police that he got them from a "random black guy with a white t-shirt."

23 **C. Purchase of a Gun to Kill a Drug Dealer with whom Himan Had Money Problems**

24 Shortly before his arrest in this case, Himan drove almost 150 miles roundtrip to obtain an
25 untraceable firearm that he stated he planned to use to kill a source of supply with whom he had money
26 issues. Himan texted a drug associate ("C.C.1") on June 2, 2020, asking where he could purchase a
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28

1 “wally,” a slang term for an untraceable gun. Himan did so using Signal, an end-to-end encrypted
 2 messaging application favored by criminals to evade law enforcement detection.

3	HIMAN	Issue with the money with primo
4	HIMAN	I need Wally
5	HIMAN	Where can I get one
6	HIMAN	Tonight
7	C.C.1	What u mean issue with the money
8	HIMAN	I need a fuckin Wally
9	C.C.1	Why
10	HIMAN	You know where one is rn
11	HIMAN	Yes or no
12	C.C.1	No I don't
13	HIMAN	How am I suppose to handle our money being fucked with
14	C.C.1	u need one to get money from primo
15	C.C.1	Go get the money from fucking primo that piece of shit
16	C.C.1	That's a lot of money
17	C.C.1	Can u catch him slinging
18	HIMAN	Im start laying niggas down
19	C.C.1	What he say
20	HIMAN	Im driving still
21	C.C.1	U really gonna lay down or u good?
22	HIMAN	Get me one and read the newspaper
23	C.C.1	Do you get primo real address
24	HIMAN	I know where to find him
25	C.C.1	Ok just calm down not worth it
26	C.C.1	Don't resort to violence peaceful protest out here brotha
27	HIMAN	Its different when you in the field
28	HIMAN	I'm mad of course

19 The next day, the text message conversation continued, and Himan indicated that he was picking up the
 20 untraceable gun in Richmond.

21	C.C.1	Wvd I'm gonna call [U/I] I'm out of meeting
22	HIMAN	Richmond
23	C.C.1	Wvd there
24	HIMAN	Picking up Wally
25	C.C.1	Bro do not do that u trippin
26	C.C.1	It's not worth it
27	C.C.1	You smarter than that
28	HIMAN	I'm not trippin I'll do it the smart way
29	C.C.1	Don't get one dude
30	C.C.1	Dumbest thing u can do u do
31	C.C.1	You don't need that its not going to solve anything

1 **D. The Charged Offense and Himan’s Dark Web Drug Dealing**

2 On June 2, 2020, Himan sold approximately two pounds of methamphetamine to an undercover
 3 officer. On June 5, 2020, the date of his arrest, Himan had set up a deal with his supplier to sell four
 4 pounds of methamphetamine to the same undercover officer.

5 During the execution of a federal search warrant at Himan’s apartment, agents seized Himan’s
 6 electronic devices, a gun holster, almost 200 grams of methamphetamine packaged for sale, and
 7 significant amounts of postal packaging and a list of names and addresses with associated amounts of
 8 narcotics, suggesting that Himan had been selling drugs on the “dark web” and mailing the drugs.

9 While agents found the gun holster that Himan had just purchased and shown to his roommate,
 10 agents could not locate the gun about which Himan had texted. Nor were agents able to locate the three
 11 other guns that are apparently registered to Himan.

12 **II. DISCUSSION**

13 **A. Legal Standard for Detention in a Presumption Case**

14 To detain a defendant pending trial based on risk of flight, the government must show by a
 15 preponderance of the evidence that there are no conditions that will reasonably assure the Defendant’s
 16 appearance as required. *See United States v. Motamedi*, 767 F.2d 1403, 1406 (9th Cir. 1985). To detain a
 17 defendant based on danger to the community, the Court must find by clear and convincing evidence that
 18 there are no conditions which “will reasonably assure the safety of any other person and the
 19 community.” 18 U.S.C. § 3142(f)(2)(B). The rules concerning admissibility of evidence in criminal
 20 trials do not apply to a detention hearing. 18 U.S.C. § 3142(f)(2)(B).

21 In cases such as this one, where there is probable cause to believe that the Defendant violated the
 22 Controlled Substances Act and faces a maximum of 10 years or more in prison, there is a rebuttable
 23 presumption that no condition or combination of conditions reasonably will assure the Defendant’s
 24 appearance as required and the safety of the community. 18 U.S.C. § 3142(e)(3)(A). In such a case, a
 25 burden of production shifts to the defendant. *United States v. Hir*, 517 F.3d 1081, 1086 (9th Cir. 2008)
 26 (citing *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986)). Although the presumption is
 27 rebuttable, it is not a “bursting bubble.” *United States v. Jessup*, 757 F.2d 378, 382-83 (1st Cir. 1985)
 28 (Breyer, J.). The presumption is not so weak that whenever the defendant introduces evidence, “the
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1 presumption ‘bursts’ and totally disappears, allowing the judge . . . to decide the question without
 2 reference to the presumption.” *Id.* Since a defendant can “always provide the magistrate with *some*
 3 reason . . . a ‘bursting bubble’ approach might render the presumption virtually meaningless, contrary to
 4 Congress’s clear intent.” *Id.* (emphasis added).

5 If, and only if, the Court finds that the defendant has rebutted the statutory presumption of
 6 detention, the Court considers four factors in determining whether the pretrial detention standard is met:
 7 (1) the nature and circumstances of the offense charged; (2) the weight of the evidence;¹ (3) the
 8 defendant’s character, physical and mental condition, family and community ties, past conduct, history
 9 relating to drug or alcohol abuse, and criminal history, as well as whether the crime was committed
 10 while the defendant was on probation or parole; and (4) the nature and seriousness of the danger to any
 11 person or to the community that would be posed by the defendant’s release. 18 U.S.C. § 3142(g).

12 **B. The Defendant is a Danger to the Community**

13 **1. The Defendant Told an Associate That He Purchased a Gun and Planned to
 14 Use It to Kill a Drug Supplier.**

15 The defendant cannot overcome the statutory presumption that he is a danger to the community.
 16 As described above, in the days before his arrest, Himan asked an associate where he could get an
 17 untraceable firearm because he was going to “start laying niggas down,” specifically, he wanted to kill a
 18 drug supplier with whom he had a financial issue. Himan told the associate that he should “get me one
 19 and read the newspaper.” In response to concerns from the associate, Himan assured the associate that
 20 he would “do it [the homicide] the smart way.” The next day, Himan confirmed that he had traveled
 21 nearly 150 miles roundtrip, from Morgan Hill to Richmond, to obtain that firearm.

22 It is true that the FBI never recovered the firearm, and the defendant may seek to minimize his
 23 statements as braggadocio. However, two important facts undermine that narrative. First, Himan also
 24 told his roommate that he had a firearm. Second, during a search of the Himan’s belongings, agents
 25 found a gun holster. Under these circumstances, the more likely explanation is that Himan “stashed,” or
 26 hid, the untraceable firearm somewhere, and that if released, he would have access to it.

27 **¹ In the Ninth Circuit, the weight of the evidence is the least important factor.**

1 **2. The Defendant's Drug Dealing Poses a Continuing Danger to the
Community.**

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3 In the latter half of 2019, Himan was arrested nearly once a month. In September 2019, Himan
4 was in the vehicle (which he allegedly stole), when an associate drove into the front door of a Western
5 Dental, nearly striking a teenage girl. After his associate was detained by bystanders, Himan fled the
6 scene and parked the stolen vehicle at the residence of a random person.

7 The following month, October 2019, Himan was found in San Francisco in another stolen Audi,
8 parked on the median. He had 500 Xanax pills that were packaged for sale. A week later, he was again
9 arrested for DUI and possession of drug paraphernalia. A week after that, Himan was arrested again.

10 Equally important, Himan's drug dealing poses a continuing danger to the community. On
11 October 15, 2019, European authorities intercepted a parcel containing five kilograms of MDMA that
12 was addressed to Himan. Several weeks later, Himan was arrested by SFPD with the 500 Xanax pills
13 packaged for sale.

14 During the FBI's investigation of this case, Himan sold more than a pound of methamphetamine
15 to an undercover officer and arranged a deal for an additional four pounds with his supplier. He also
16 told the undercover that he sold drugs to end users all over the country, which was corroborated by
17 mailing addresses that the FBI found among his belongings.

18 “Danger” does not just mean the threat of physical harm. The defendant’s ongoing drug dealing
19 by itself constitutes a danger to the community sufficient to justify pretrial detention. *United States v.*
20 *Parodi*, No. CR 08-0083 PJH, 2008 WL 683421, at *3 (N.D. Cal. Mar. 7, 2008) (“In assessing danger,
21 physical violence is not the only form of danger contemplated by the statute. Danger to the community
22 can be in the form of continued narcotics activity”); *see also United States v. Wolf*, No. CR 15-263-
23 EJD, 2015 WL 4573039 (N.D. Cal. Jul. 29, 2015) (Davila, J.) (“Because this evidence demonstrated
24 Defendant’s continuing involvement with the distribution of drugs, the danger to the community he
25 posed if released was established by clear and convincing evidence”). The danger in this case is
26 particularly acute because, despite Himan’s repeated arrests by law enforcement, he has not been
27 deterred from continuing to sell illegal drugs.

1 **C. There Are No Conditions That Will Reasonably Assure Himan's Presence at Court**
 2 **Proceedings.**

3 Particularly in light of the statutory presumption that he is a flight risk, the Court can readily find
 4 by a preponderance of the evidence no combination of conditions is sufficient to ensure that Himan will
 5 appear in court and face the charges against him. Himan is a United States citizen, but he has no
 6 permanent residence. Although he grew up in the Bay Area, he has little in the way of family ties that
 7 would convince him to stay in the area for Court. His relatives are unwilling to assist with bail,
 8 presumably because they do not trust him to comply with conditions this Court might set or are afraid of
 9 him. He holds a Master's Degree but is unemployed.

10 Himan's demonstrated access to large sums of cash and the strength of the evidence against him,
 11 including undercover buy recordings and Himan's text messages, make him a serious risk of flight.
 12 While Himan was arrested with just a few thousand dollars, he also uses cryptocurrency, which is
 13 designed to be anonymous and easy to hide. The fact that Himan faces a significant sentence (a
 14 minimum of five years, but based on the quantity of drugs he is alleged to have sold, eligible for a ten-
 15 year minimum) means he has great incentive to flee. *See Parodi* at *2 ("[I]n cases with large sums of
 16 cash available to the defendant the court may draw the conclusion that the defendant has the means to
 17 abscond. A defendant's financial condition and the length of sentence he or she faces are of particular
 18 importance in assessing the risk of flight."); *United States v. Townsend*, 897 F.2d 989, 994 (9th Cir.
 19 1990) (the preponderance of the evidence shows a risk of flight where, among other factors, the weight
 20 of the evidence is enough to alert the defendant to a "reasonable possibility of conviction").

21 **III. CONCLUSION**

22 The government respectfully requests that the Court detain the defendant as both a danger to the
 23 community and another person, and as serious risk of non-appearance pending the resolution of this
 24 case. The defendant has requested a combined change of plea and sentencing, which has been set for
 25 April 7, 2021.

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1 DATED: December 20, 2020

Respectfully submitted,

2 DAVID L. ANDERSON
3 United States Attorney

4 /s/
5 DANIEL PASTOR
6 Assistant United States Attorney
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